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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-255

MICHAEL VINCENT MURPHY, III,
Petitioner,

v.

BARBARA BROWNE MURPHY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia entered in the above-styled case on May 21, 1974.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported at 232 Ga. 352 (206 SE2d 458) and is set out in the Appendix, infra at 1a. The Judgment rendered by the Supreme Court of Georgia is set out in the Appendix, infra at 4a. A timely motion for rehearing was denied on June 12, 1974. The denial is set out in the Appendix, infra at 5a. The corrected order of the Su-

perior Court of Fulton County, Georgia, on Plaintiff's Motion to Dismiss, which is unreported, is set out in the Appendix, infra at 6a.

JURISDICTION

The opinion and judgment of the Supreme Court of Georgia was entered on May 21, 1974. A timely petition for rehearing was denied on June 12, 1974. This court has jurisdiction under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

Whether the alimony statutes of the State of Georgia as contained in Title 30, Sections 201 (Code of 1933); 202 (Code of 1933); 202.1 (Ga. L. 1967, p. 591); 203 (Code of 1933); 204 (Code of 1933); 206 (Code of 1933, Acts 1870, p. 413); 209 (Acts 1806, Cobb, 224, 225; Acts 1866, pp. 146, 147; Acts 1966, p. 160); 212 (Code of 1933), Ga. Code Ann., as amended, are valid or whether they are repugnant to the provisions of the Fifth and Fourteenth Amendments to the Constitution of the United States because the said alimony statutes discriminate against Petitioner and deny him equal protection and due process of the laws and are thus unconstitutional.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law."

United States Constitution, Amendment XIV, Section 1:

> ". . . nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Sections 201, 202, 202.1, 203, 204, 206, 209, and 212 of Title 30, Georgia Code as Amended are set forth in their entirety in the Appendix, infra at 10a-12a.

STATEMENT OF THE CASE

On June 12, 1972, Petitioner, through his attorney of record, filed his Complaint for Divorce against the Respondent in the Superior Court of Fulton County, Georgia, same being Case No. B-75633, demanding therein:

(a) That plaintiff be granted a total divorce, that is to say a divorce a vinculo matrimonii upon legal principles;

(b) That plaintiff be awarded both temporary and permanent custody of the said minor child named in the petition;

(c) That the said defendant herein be temporarily restrained and enjoined from transferring, selling or conveying the 130 shares of American Telephone and Telegraph stock and the 75 shares of Polaroid stock in any manner whatsoever;

(d) That plaintiff be awarded legal title to the said 130 shares of American Telephone and Telegraph stock and the 75 shares of Polaroid stock;

(e) That a Rule Nisi issue.

On July 13, 1972, Respondent, through her then attorney of record, filed her Answer and Counter-Claim against Petitioner in the said case alleging, *inter alia:*

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The defendant shows that she has been required to obtain the services of an attorney to represent her in this matter and asks that she be awarded attorneys' fees from the plaintiff to assist in the payment for her attorney.

–11–

The defendant requests that the property of the parties be reasonably distributed between the parties and that she receive her portion of property as temporary and permanent alimony. The defendant further requests that the plaintiff be required to keep in full force and effect one or more life insurance policies on the plaintiff's life in the total amount of at least $100,000.00 listing the parties' minor daughter as beneficiary until said child reaches the age of 21 years.

and praying, *inter alia:*

(c) That the defendant be awarded temporary and permanent alimony and child support to include an award for attorneys' fees; . . .

After an Interlocutory Hearing, the trial court entered a Temporary Order on September 28, 1972, denying the Respondent any temporary alimony; awarding temporary custody of the minor child of the parties to Dr. and Mrs. Michael Vincent Murphy, Jr., the paternal grandparents; enjoining Respondent from disposing of the 130 shares of stock in American Telephone and Telegraph Company and the 75 shares of stock in the Polaroid Company; and also enjoining Petitioner from conveying any stocks, bonds or other assets which he then held except as might be necessary to meet his business and living expenses and legal obligations. On December 6, 1973, appellee, through his attorney of record, filed his Motion to Dismiss Para-

graphs 10 and 11 of appellant's counterclaim and subparagraph (c) of her prayers on the ground that said demands for temporary and permanent alimony and attorneys' fees failed "to state a claim upon which relief properly can be granted for the reason that said demands are based on Sections 30-202, 30-202.1 (Acts 1967, p. 591), 30-203, 30-204, 30-207, 30-209 (Acts 1970, p. 413), and 30-210, 30-213 of the Georgia Code, which statutes provide that alimony and attorneys' fees in alimony and divorce litigation shall be awarded to wives only, which consequently discriminate against husbands as a class of which defendant is a member and which, as applied to plaintiff, would discriminate against him and deny him equal protection of the laws . . ."

The plaintiff thereafter amended his said Motion to Dismiss and on December 26, 1973, the Superior Court of Fulton County, Georgia, granted Petitioner's Motion to Dismiss, and entered a Certificate of Appealability on January 4, 1974, certifying that the granting of the said order was of such importance that immediate review should be had and that a direct appeal in the said matter was proper. On January 4, 1974, respondent filed her Motion for Corrected Order on Petitioner's Motion to Dismiss and her Motion for Reconsideration. On January 24, 1974, the Superior Court of Fulton County, Georgia denied respondent's Motion for Reconsideration and on January 25, 1974, entered its corrected Order, again holding the Georgia Alimony Statutes as set forth in Petitioner's Motion to Dismiss as amended, unconstitutional.

The respondent appealed to the Supreme Court of Georgia from the said corrected order of the Superior

-10-

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The respondent appealed to the Supreme Court of Georgia from the said corrected order of the Superior

Court of Fulton County, Georgia, dated January 24, 1974, and entered January 25, 1974, by filing a timely Notice of Appeal on January 25, 1974.

The Supreme Court of Georgia reversed the ruling of the Superior Court of Fulton County, Georgia, in a unanimous opinion, holding that the said alimony statutes are constitutional and citing the case of *Kahn v. Shevin*, ____ U.S. ____ (94 SC 1734, 40 LE2d 189) (1974), which was not decided until after the Appeal was pending in the Supreme Court of Georgia, as controlling authority.

Since the decision of the Supreme Court of Georgia in this case, the said matter has not been tried but is still pending in the Superior Court of Fulton County, Georgia, awaiting a final jury trial.

REASONS FOR GRANTING THE WRIT

The Georgia Alimony Statutes discriminate on the basis of sex and have no fair and substantial relationship to the object of the legislation and work an invidious discrimination in violation of the Constitution of the United States.

In the State of Georgia, husbands are not allowed the benefit of alimony from wives, *Barnes v. Barnes*, 230 Ga. 226, and inasmuch as alimony and the right to attorney fees are exclusively statutory and the right of the husband to be paid alimony and attorney fees has been specifically denied by the Courts, Supra *Barnes v. Barnes*, 230 Ga. 226, there is here a clear case of discrimination on the basis of sex. A discriminatory classification can be justified under the equal protection clause of the United States Constitution, Fourteenth Amendment, only if it has a rational basis. In the case

of alimony, there is no rational basis for discrimination between men and women. Each case should be decided upon its own merits as there are women who require no alimony by virtue of their ability to earn or their independent wealth and there are certainly men who require alimony or support by virtue of their inability to earn for whatever reason.

In *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251, 302 Fed. 2d 225 (1971), this court held that a statute giving preference to men over women in appointments as administrators of estates violates the Federal equal protection clause and concluded that by ignoring the individual qualifications of particular applicants, the challenged statute provided "dissimilar treatment for men and women who are . . . similarly situated." The court noted that the Idaho Statute "provides that different treatment be accorded to the applicants on the basis of their sex; it thus establishes a classification subject to scrutiny under the equal protection clause."

The Court in *Reed* established the following test for determination of the constitutionality of legislation which discriminates on the basis of sex: to be constitutional the classification established by statute must be

> "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Applying the *Reed* test to the case at bar, one must conclude that discrimination between men and women in the matter of alimony and counsel fees is unconstitutional.

Numerous other instances have arisen in recent years

where sexual discrimination has been found unconstitutional. It has been held that an unconstitutional denial of equal protection occurred where women are subjected to more stringent sentencing than men, *United States ex rel. Robinson v. York*, 281 F. Supp 8 (D. Conn. 1968); where women are excluded from a state university, *Kirstein v. Rector and Visitors of University of Virginia*, 309 F. Supp 184 (E.D. Va. 1970); where women are excluded from employment and required to terminate employment at a particular state of pregnancy, *Eslinger v. Thomas*, 196 F.2d 225 (4th Cir. 1973); *Heath v. Westerville Board of Education*, 345 F. Supp 501 (S.D. Ohio 1972); where female students are not permitted to join school athletic teams, *Reed v. Nebraska School Activities Association*, 341 F. Supp 258 (D. Neb. 1972) (preliminary injunction granted on ground of probable success); where women are excluded by statute from serving on juries, *White v. Crook*, 251 F. Supp 401 (D.D. Ala. 1966); where men but not women are given the right to recover against tortfeasors for loss of consortium, *Karczewski v. Baltimore & Ohio RR Co.*, 274 F. Supp 169 (N.D. Ill. 1967); *Owen v. Illinois Baking Corp.*, 260 F. Supp 820 (W.D. Mich. 1966); and where women are prohibited from tending bar, *Sailor Inn, Inc. v. Kirby*, 95 Cal. Rptr. 329, 485 P. 2d 529 (1971).

The only reasonable justification for the Georgia alimony and attorney fee statutes is historical and is no longer sustainable in view of modernized divorce and married women's property laws, and progress in women's social and economic status.

The case of *Frontiero v. Richardson*, 411 U.S. 617, dealt with the question of whether a difference in treat-

ment of male and female Uniformed Services members under certain Federal Statutes constituted an unconstitutional discrimination against Service women in violation of the due process clause of the Fifth Amendment of the Federal Constitution. In that case, the Appellant contended that classification based upon sex, like classification based upon race, alienage and national origin, are inherently suspect and must, therefore, be subjected to close judicial scrutiny, and the Court agreed and found implicit support for that approach in the unanimous decision in *Reed v. Reed, supra.* Mr. Justice Brennan, in announcing the judgment of the Court, said in part,

"There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women not on a pedestal, but in a cage. Indeed, this paternalistic attitude became so firmly rooted in our national consciousness that, exactly 100 years ago, a distinguished member of this Court was able to proclaim:

> 'Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity of interests and views which belong, or should belong, to the family institution is repugnant to the ideas of a woman adopting a dis-

> tinct and independent career from that of her husband . . .'
>
> '. . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.' *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130, 141 (1873) (Bradley, J., concurring).

"As a result of notions such as these, our statute books gradually became laden with gross, stereotypical distinctions between the sexes and, indeed, throughout much of the century the position of women in our society, was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. . . .

"Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . . ' *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972). And what differentiates sex from such nonsuspect statutes as intelligence or physical disability and aligns it with the recognized suspect criteria, is that sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal

status without regard to the actual capabilities of its individual members."

In the case of *Bugden v. Bugden*, 225 Ga. 413, Justice Undercofler, speaking for the Court in Section 3 of that Opinion, found the Georgia Alimony Statutes therein under attack to be constitutional, and based the Court's opinion on the moral, social, economic and physical differences which distinguished the sexes and divide them into natural classes, which follows the reasoning set out in *Bradwell v. Illinois*, 83 U.S. 130, *supra*, and which has been categorically and directly repudiated by *Frontiero v. Richardson*, *supra*. Moreover, both *Reed* and *Frontiero*, *supra*, were decided after the decision by the Georgia Court in the *Bugden* case.

The Georgia Supreme Court erroneously construed and misapplied the case of *Kahn v. Shevin*, ____ U.S. ____ (94 SC 1734, 40 LE2d 189) decided April 24, 1974, which the Georgia Court states in its opinion is controlling of the constitutional question therein decided.

Petitioner contends that the *Kahn* case is distinguished from the case of *Frontiero v. Richardson*, *supra*, in that the majority opinion itself stated that they did not follow directly *Frontiero* or *Reed*, but was decided as a tax case as it concerned a tax exemption. *Kahn* did not stand for the proposition that sex-based classifications in all economic and social legislation are constitutional. The cases on which the opinion relied were all taxation cases reflecting the Court's well-established policy of not infringing upon the taxing power of the States. Consequently, the Georgia Supreme Court, in applying the *Kahn* decision to the alimony statutes, expanded it beyond its meaning.

While alimony laws are intended to help women who are economically dependent on their husbands to meet the burdens of separation and divorce, there are other policies inherent in alimony laws. Alimony statutes have a much broader impact on the economic status of men and directly affect men to their detriment in a vast number of cases for reasons that are often arbitrary and unfair. The widow's tax exemption had no such invidious effect on men. It simply was denied to them.

Petitioner, an ex-Army Captain and Viet Nam Veteran, when confronted by a demand for a divorce upon his return to this Country from his overseas duty, should be allowed to assert his claims for certain personal property against the Respondent on a meritorious basis in the trial court.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF GEORGIA

May 21, 1974

28782. MURPHY v. MURPHY.

INGRAM, Justice.

This case is before the court on appeal from the order entered by the Superior Court of Fulton County on December 26, 1973, and the corrected order of the Superior Court of Fulton County entered January 25, 1974, holding "the alimony statutes of the State of Georgia as contained in Title 30, Sections 201 (Code of 1933); 202 (Code of Ga. of 1933); 202.1 (Ga. L. 1967, p. 591); 203 (Code of Ga. of 1933); 204 (Code of 1933); 206 (Code of Ga. of 1933, Acts 1870, p. 413); 209 (Acts 1806, Cobb, 224, 225; Acts of 1866, pp. 146, 147; Acts 1966, p. 160); 212 (Code of 1933), Ga. Code Ann., as amended, are unconstitutional because they violate the constitutional provisions of the Fifth and Fourteenth Amendments of the United States Constitution and Art. I, Par. III, and Art. I, Par. XXV of the Constitution of the State of Georgia."

The appellee-husband's brief acknowledges that in the case of *Bugden v. Bugden*, 225 Ga. 413 (3) (169 SE2d 337, cert. den. 396 U.S. 1005, 24 LE2d 497), this court "found the Georgia alimony statutes therein under attack to be constitutional," but argues that subsequent to *Bugden*, the United States Supreme Court decided the cases of *Reed v. Reed*, 404 U.S. 71 (92 SC 251, 30 LE2d 225) (1971), and *Frontiero v. Richardson*, 411 U.S. 677 (93 SC 1764, 36 LE2d 583) (1972), which require *Bugden* to be overruled by this Court. We do

not agree. In *Kahn v. Shevin*, ____ U.S. ____ (94 SC 1734, 40 LE2d 189) (1974), the United States Supreme Court approved the constitutionality of a Florida statute which grants widows an annual property tax exemption of $500 but offers no analogous benefit for widowers. This case had not been decided at the time briefs were filed in the present case before this court, but we believe the ratio decidendi of *Kahn* is dispositive of the issues presented here. See also *Dill v. Dill*, 232 Ga. 231; and *Husband M. v. Wife M.*, decided by the Supreme Court of Delaware, April 18, 1974, 42 L. W. 2550.

The United States Supreme Court determined the Florida statute involved in the *Kahn* case, providing different treatment of widows and widowers " 'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation' *Reed v. Reed*, 404 U.S. 71, 76 [92 SC 251, 30 LE2d 225], quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 [40 SC 560, 64 LE 989]." Id., p. 4, slip opinion. The court there went on to say: "This is not a case like *Frontiero v. Richardson*, 411 U.S. 677 [93 SC 1764, 36 LE2d 583], where the Government denied its female employees both substantive and procedural benefits granted males 'solely for administrative convenience' . . . We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionally heavy burden."

The court also observed in its opinion that the financial diffculties confronting the lone woman exceed those facing the man and this disparity of earnings is likely to be exacerbated for the widow. "While the widower can usually continue in the occupation which preceded

his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer." Id., pp. 3, 4, slip opinion.

These reasons are equally applicable and cogent in the case of a dependent wife involved in the demise of a marriage who is seeking a divorce and alimony or only alimony. It is the dependent wife of a broken marriage for whom the alimony statutes of Georgia were designed to provide financial support. As noted in footnote 10 of the majority opinion of the court in *Kahn*, " 'We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.' *Ferguson v. Skrupa*, 372 U.S. 726, 730."

In reviewing the Georgia statutes drawn into question in this case, we decide only that these statutes are constitutional and any modification or repeal of these alimony laws must necessarily be made by the General Assembly of Georgia and not by the court. The judgment of the trial court will be reversed.

Judgment reversed. All the Justices concur.

SUPREME COURT OF GEORGIA

Atlanta, May 21, 1974

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

BARBARA BROWNE MURPHY

v.

MICHAEL VINCENT MURPHY, III

This case came before this court upon an appeal from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed for the reasons stated in the opinion this day filed. All the Justices concur.

SUPREME COURT OF GEORGIA

Atlanta, June 12, 1974

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

BARBARA BROWNE MURPHY

v.

MICHAEL VINCENT MURPHY, III

Upon consideration of the motion for a rehearing filed in this case it is ordered that it be hereby denied.

THE SUPERIOR COURT FOR THE COUNTY OF FULTON, STATE OF GEORGIA

MICHAEL VINCENT MURPHY, III, *Plaintiff,* v. BARBARA BROWNE MURPHY, *Defendant.*	CIVIL ACTION FILE NO. B-75633

CORRECTED ORDER ON PLAINTIFF'S MOTION TO DISMISS

Plaintiff's Motion to Dismiss as Amended, coming on regularly to be heard, and this Court having previously heard argument of counsel for plaintiff and defendant and citation of authorities on questions and issues raised by the Motion as amended, no further hearing by the Court being necessary or required, this Court makes its findings as follows:

I

FINDINGS OF FACT

The Court finds that the defendant herein, MRS. BARBARA BROWNE MURPHY, in her Answer and Cross-Action, seeks temporary and permanent alimony for herself and said minor child, and that she sets forth this affirmative relief in her Cross-Action by the allegations contained in Paragraphs 8, 9, 10 and 11 and Subparagraph (c) of her prayer.

That the defendant was denied any temporary alimony except an award of attorney fees by the trial court at the temporary hearing on the issues of custody of the minor child and temporary alimony.

That thereafter the plaintiff herein has filed his Motion to Dismiss Paragraphs 10 and 11 of defendant's Cross-Action and Subparagraph (c) of the defendant's prayer and has amended his said Motion to Dismiss in certain respects, and further that the plaintiff predicates his Motion to Dismiss on the unconstitutionality of the alimony statutes of the State of Georgia, specifically as set out in Title 30, Sections 201 (Code of Ga. of 1933); 202 (Code of Ga. of 1933); 202.1 (Ga. Laws 1967, p. 591); 203 (Code of Ga. of 1933); 204 (Code of Ga. of 1933); 206 (Code of Ga. of 1933, Acts 1870, p. 413); 209 (Acts 1806, Cobb, 224, 225; Acts 1866, pp. 146, 147; Acts 1966, p. 160); 212 (Code of Ga. of 1933), contained in the Georgia Code Annotated as Amended, because the said Statutes provide that alimony for the wife and children and attorney fees in alimony and divorce litigation shall be awarded to wives only, which consequently discriminate against husbands as a class of which plaintiff is a member, and which as applied to the plaintiff in this litigation discriminates against him on the basis of sex and deny him equal protection of law and violate the due process clause of the Fifth Amendment of the United States Constitution and the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution as contained in Section 1 thereof, and also violate Article I, Paragraph III, and Article I, Paragraph XXV, of the Constitution of the State of Georgia.

II

CONCLUSIONS OF LAW

Plaintiff contends that the alimony statutes of the State of Georgia as hereinabove set out are unconstitu-

tional on their face, because the very definition of alimony is ". . . an allowance out of the husband's estate made for the support of the wife when living separate from him . . ." because it denies husbands as a class due process and equal protection of the law as guaranteed him by the Constitution of the State of Georgia and by the Constitution of the United States, and plaintiff relies on and has cited to this Court as authority the cases of *Reed v. Reed*, 404 U.S. 71 (1971); and *Frontiero v. Richardson*, 93 S. Ct. 1974 (1973).

In the *Reed* case, the Supreme Court found that an Idaho Statute providing that when two individuals are otherwise equally entitled as administrator of an estate, the male applicant must be preferred to the female, and the Court noted that the Idaho Statute provided that different treatment be accorded to male and female applicants on the basis of their sex, thus establishing a classification subject to scrutiny under the Equal Protection Clause of the United States Constitution.

In the *Frontiero* case, a married woman and Air Force officer asked for increased benefits for her husband as a dependent and the Air Force applied different standards to her as opposed to male officers and her application was denied, and the Court citing at length from the *Reed* opinion concluded that classification based upon sex, like classification based upon race, alienage or national origin, are inherently suspect and must therefore be subject to strict judicial scrutiny. Applying the analysis mandated by that strict standard of review, the Court held the statutory scheme constitutionally invalid because the sole basis of the classification was the sex of the individuals involved.

THEREFORE, IT IS CONSIDERED, ORDERED and ADJUDGED:

That the plaintiff's Motion to Dismiss be and the same is hereby sustained on each and every ground thereof as to each and every Georgia alimony provision of law under attack, and this Court finds that the alimony statutes of the State of Georgia as contained in Title 30, Sections 201 (Code of Ga. of 1933); 202 (Code of Ga. of 1933); 202.1 (Ga. Laws 1967, p. 591); 203 (Code of Ga. of 1933); 204 (Code of Ga. of 1933); 206 (Code of Ga. of 1933, Acts 1870, p. 413); 209 (Acts 1806, Cobb, 224, 225; Acts 1866, pp. 146, 147; Acts 1966, p. 160); 212 (Code of Ga. of 1933), Georgia Code Annotated as Amended, are unconstitutional, because they violate the constitutional provisions of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Paragraph III, and Article I, Paragraph XXV, of the Constitution of the State of Georgia.

This 24th day of January, 1974.

_____

Judge, Superior Court, A.J.C.

Submitted By:

_____

JOHN C. TYLER
Attorney for Plaintiff

_____

WILLIAM W. COWAN
Attorney for Defendant

Filed in Office Jan. 25, 1974
Janet Moore
Deputy Clerk Superior Court
Fulton County Georgia

TITLE 30, CODE OF GEORGIA

§201. Definition. Permanent and temporary.—Alimony is an allowance out of the husband's estate, made for the support of the wife when living separate from him. It is either temporary or permanent. (Code of 1933)

§202. Proceedings to obtain temporary alimony.—Whenever an action for divorce, at the instance of either party, or a suit by the wife for permanent alimony, shall be pending, the wife may, at any regular term of the court in which the same shall be pending, apply to the presiding judge, by petition, for an order granting to her temporary alimony pending the cause; and, after hearing both parties and evidence as to all the circumstances of the parties and as to the fact of marriage, the court shall grant an order allowing such temporary alimony, including expenses of litigation, as the condition of the husband and the facts of the case may justify. (Code of 1933)

§202.1. The grant of attorneys' fees to be a final judgment.—The grant of attorneys' fees as a part of the expenses of litigation made at any time during the pendency of the litigation, whether the action be for alimony, divorce and alimony, or contempt of court arising out of either an alimony case or a divorce and alimony case, shall be a final judgment as to the amount granted, whether the grant be in full or on account, and may be enforced by attachment for contempt of court or by writ of fieri facias, whether the parties subsequently reconcile or not: Provided, that nothing contained herein shall be construed to mean that attorneys' fees shall not be awarded at both the temporary hearing and the final hearing. (Ga. L. 1967, p. 591)

§203. Discretion of the judge as to temporary alimony.—In arriving at the proper provision, the judge shall consider the peculiar necessities of the wife growing out of the pending litigation; also any evidence of a separate estate owned by the wife; and if such estate is ample, as compared with the husband's, temporary alimony may be refused. (Code of 1933)

§204. Revision and enforcement of order allowing alimony.—The order allowing alimony shall be subject to revision by the court at any time, and may be enforced either by writ of fieri facias or by attachment for contempt against the person of the husband. A failure to comply with the order shall not deprive the husband of his right either to prosecute or defend his cause. (Code of 1933)

§206. Support and custody of children pending suits for divorce; liability of husband for necessaries.—In suits for divorce, the judge presiding may, either in term or vacation, grant alimony, or decree a sum sufficient for the support of the family of the husband dependent upon him, and who have a legal claim upon his support, as well as for the support of his wife; and may also hear and determine who shall be entitled to the care and custody of the children pending the litigation, as if the same were before him on a writ of habeas corpus; and in case a sum shall be awarded for the support of said family, the husband shall not be liable to third persons for necessaries furnished them. (Code of 1933, Acts 1870, p. 413)

§209. Jury may provide permanent alimony; factors in determining amounts; effect of remarriage by wife.—The jury rendering the final verdict in a divorce suit may provide permanent alimony for the wife, either

from the corpus of the estate or otherwise, according to the condition of the husband. In all cases where alimony is awarded to the wife, her separate estate and earning capacity, as well as any fixed liabilities of the husband for the support of minor children, shall be taken into consideration in fixing the amount. All obligations for permanent alimony to the wife, whether created by contract, verdict, judgment, or decree, the time for performance of which has not yet arrived, shall cease upon her remarriage unless otherwise provided in the decree. (Acts 1806, Cobb, 224; 225; Acts 1866, pp. 146, 147; Acts 1966, p. 160)

§212. **Decree in equity.**—In the absence of such provision, on the application of the wife, equity may, by decree, compel the husband to make such provision for the support of the wife and such minor children as may be in her custody as indicated in the foregoing section. (Code of 1933)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-255

MICHAEL VINCENT MURPHY III,

Petitioner,

v.

BARBARA BROWNE MURPHY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT IN OPPOSITION

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October 7, 1974

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BARBARA BROWNE MURPHY,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Georgia (A. 1a-3a) is reported at 232 Ga. 352, 206 S.E.2d 458 (1974). This opinion reversed an order of the Superior Court of Fulton County, Georgia, dated January 24, 1974, which is unreported (A. 6a-7a), and held the Georgia alimony statutes constitutional. The denial by the Supreme Court of Georgia of petitioner's motion for rehearing (A. 5a) is reported at 232 Ga. 352, 354, 206 S.E.2d 458 (1974).

JURISDICTION

The final judgment sought to be reviewed is the decision of the Georgia Supreme Court rendered on May

21, 1974 (A. 1a-3a), with respect to which a motion for rehearing was denied on June 12, 1974. Petitioner asserts this Court has jurisdiction under 28 U.S.C. §1257(3) to review by writ of certiorari this decision of the Georgia Supreme Court.

QUESTION PRESENTED

Whether the Supreme Court of Georgia in holding the Georgia alimony statutes constitutional against due process and equal protection challenges has decided a substantive federal question previously undetermined by this Court or rendered a decision contrary to applicable decisions of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions relied upon by petitioner are contained in those portions of the Fifth and Fourteenth Amendments to the Constitution of the United States which provide:

> "No person . . . shall be deprived of life, liberty, or property, without due process of law . . . ."

U.S. CONST. amend. V.

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

U.S. CONST. amend. XIV, §2. The specific sections of the Georgia alimony statutes alleged to be unconstitutional by petitioner are Title 30, Sections 201, 202, 203, 204,

206, 209, and 212 of the GA. CODE of 1933 and GA. LAWS, 1967 at 591, all as amended, (GA. CODE ANN. §§30-201, 30-202, 30-203, 30-204, 30-206, 30-209, 30-212 and 30-202.1 respectively) all of which are completely set forth in the Appendix to the Petition at 10a-12a.

STATEMENT

Petitioner and respondent were married September 17, 1969, and separated April 1, 1972. (R. 51, 52). There is one child of said marriage, Alysia Michele Murphy, born October 1, 1970, who is currently 4 years old. (R. 52, 53). Petitioner was graduated from Vanderbilt University and on September 15, 1972, was employed by Shepherd Construction Company at the salary of $195.00 per week as a foreman specifically in charge of safety and traffic control. (R. 50, 51, 54). In addition to the salary derived from his position with Shepherd Construction Company, petitioner receives approximately $400.00 annually in dividends from 130 shares of American Telephone and Telegraph stock, 20 shares of Trust Company of Georgia stock, 75 shares of Rich's, Inc. stock, 75 shares of The Polaroid Corporation stock, 26 shares of Atlantic Steel Company stock, 22 shares of Bibb Manufacturing Company stock, 13 shares of Atlantic Steel Company stock, 10 shares of Georgia Power Company stock and a $4700.00 partnership interest in Metro Atlanta Properties. (R. 164-65). Furthermore, petitioner, on February 5, 1972, became entitled to both principal and income from a trust established by Michael V. Murphy, Sr., valued at $118,108.88 and on September 15, 1972, had a balance of approximately $1400.00 in his checking account. (R. 166, 172). Based on his said financial condition, petitioner has testified that he is in a position not

only to support himself but also his wife and child. (R. 62).

On June 12, 1972, petitioner, through his attorney of record, filed his Complaint for Divorce against respondent in the Superior Court of Fulton County, Georgia, demanding:

> "(a) That plaintiff be granted a total divorce, that is to say a divorce a vinculo matrimonii upon legal principles;"
>
> "(b) That plaintiff be awarded both temporary and permanent custody of said minor child named in the petition;"
>
> "(c) That the said defendant herein be temporarily restrained and enjoined from transferring, selling or conveying the 130 shares of American Telephone and Telegraph stock and the 75 shares of Polaroid stock in any manner whatsoever;"
>
> "(d) That plaintiff be awarded legal title to the said 130 shares of American Telephone and Telegraph stock and the 75 shares of Polaroid stock;"
>
> "(e) That a Rule Nisi issue."

(R. 9, 10). On July 5, 1972, respondent, through her then attorney of record, filed her Answer and Counter-Claim against petitioner alleging, *inter alia:*

> 10.
>
> "The defendant shows that she has been required to obtain the services of an attorney to represent her in this matter and asks that she be awarded attorneys' fees from the plaintiff to assist in the payment of her attorney."
>
> 11.
>
> "The defendant requests that the property of

> the parties be reasonably distributed between the parties and that she receive her portion of property as temporary and permanent alimony. The defendant further requests that the plaintiff be required to keep in full force and effect one or more life insurance polices on the plaintiff's life in the total amount of at least $100,000.00 listing the parties' minor daughter as beneficiary until said child reaches the age of 21 years."

and praying, *inter alia:*

> "(c) That the defendant be awarded temporary and permanent alimony and child support to include an award for attorneys' fees; . . ."

(R. 11, 12). On September 15, 1972, at a hearing in the Superior Court of Fulton County, Georgia, the Court heard testimony on the issues of temporary alimony, temporary custody of the minor child of petitioner and respondent, and whether petitioner and respondent should be restrained and enjoined from selling, transferring and otherwise disposing of certain securities. (R. 48-190). On September 28, 1972, the Superior Court of Fulton County, Georgia, entered its Temporary Order denying respondent temporary alimony, awarding temporary custody of said minor child to Doctor and Mrs. Michael V. Murphy, Jr., the child's paternal grandparents, enjoined respondent from disposing of 130 shares of stock of American Telephone and Telegraph Company and 75 shares of stock of The Polaroid Company, and enjoined petitioner from conveying any stocks and bonds or other assets which he then held, except as may be necessary to meet his basic business and living expenses and legal obligations. (R. 13, 14).

On December 6, 1973, petitioner through his attorney of record, filed his Motion to Dismiss Paragraphs 10 and

11 of appellant's counterclaim and subparagraph (c) of her prayers on the ground that said demands for temporary and permanent alimony and attorneys' fees failed "to state a claim upon which relief properly can be granted for the reason that said demands are based on Sections 30-202, 30-201.1 (Acts 1967, p. 591), 30-203, 30-204, 30-207, 30-209 (Acts 1870, p. 413), and 30-210, 30-213 of the Georgia Code, which statutes provide that alimony and attorneys' fees in alimony and divorce litigation shall be awarded to wives only, which consequently discriminate against husbands as a class of which defendant is a member and which, as applied to respondent, would discriminate against [him] and deny him equal protection of the laws . . . ." (R. 15-18).

On December 26, 1973, respondent filed his amendment to his Motion to Dismiss. (R. 19-22). On December 26, 1973, the Superior Court of Fulton County granted petitioner's Motion to Dismiss. (R. 23-25). On January 4, 1974, respondent filed her Motion for Corrected Order on petitioner's Motion to Dismiss and her Motion for Reconsideration. (R. 27-42). On January 24, 1974, the Superior Court of Fulton County denied respondent's Motion for Reconsideration and on January 25, 1974, entered its Corrected Order, again holding the Georgia alimony statutes as set forth hereinabove unconstitutional. (R. 43-47). Respondent appealed to the Supreme Court of Georgia which on May 21, 1974, reversed the Judgment of the Superior Court and held the Georgia alimony statutes constitutional. (R. 191-96). *Murphy v. Murphy*, 232 Ga. 352, 206 S.E.2d 458 (1974). On May 31, 1974, petitioner moved for a rehearing before the Supreme Court of Georgia which motion was denied June 12, 1974. (R. 197-203).

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED ON THE GROUNDS THAT PRIOR DECISIONS OF THIS COURT ARE DETERMINATIVE OF THE FEDERAL ISSUES HEREIN AND THE DECISION OF THE GEORGIA SUPREME COURT HOLDING THE GEORGIA ALIMONY STATUTES CONSTITUTIONAL IS IN ACCORD WITH THESE DECISIONS.

Although this Court has not ruled on the merits of the precise federal question decided by the Supreme Court of Georgia, prior decisions of this Court are determinative of the federal issues herein and the decision of the Georgia Supreme Court holding the Georgia alimony statutes constitutional is in accord with these decisions. In fact, on January 12, 1970, this Court denied a Petition for Writ of Certiorari to the Georgia Supreme Court which, if granted, would have raised substantially the identical question which petitioner now seeks to have reviewed. *Bugden v. Bugden,* 225 Ga. 413, 169 S.E.2d 337 (1969), *cert. denied,* 396 U.S. 1005, 90 S. Ct. 558, 24 L. Ed.2d 497 (1970). In *Bugden,* the defendant husband contended "that Sections 1, 2, 3 and 4 of Ga. L. 1005, pp. 630-632; 1964, pp. 713, 714 (Code Ann. §§30-220, 30-221, 30-223) are individually and collectively unconstitutional in violation of the equal protection clauses of the State and Federal Constitutions (Code Ann. §§2-102, 1-815) because they do not allow *a male to file an application for a modification of alimony by which he would receive payment from the female and fails to give him the rights to make the female pay reasonable expenses of litigation where she files for an increase in her perma-*

nent alimony" (original emphasis). *Bugden v. Bugden, supra* at 415. In ruling on this question the Georgia Supreme Court held:

> "It is not a denial of the equal protection clauses of the State and Federal Constitutions to refuse to allow the husband to modify an alimony judgment claiming such right or to deny him attorney fees when the wife files for an increase in permanent alimony. The moral, social, *economic* and physical differences which distinguish the sexes and divide them into natural classes justify differences in the legislative treatment of them." (emphasis added).

Bugden v. Bugden, supra at 416. Although the identical statutes are not challenged in the instant action, respondent submits that the issues presented in *Bugden* are the same as those which petitioner now seeks reviewed.

To escape the impact of *Bugden,* petitioner contends that the rationale of the Georgia Supreme Court in that case, *i.e.* the economic differences which distinguish the sexes, has been categorically and directly repudiated by *Reed v. Reed,* 404 U.S. 71, 92 S. Ct. 251, 30 L. Ed.2d 225 (1971) and *Frontiero v. Richardson,* 411 U.S. 677, 93 S. Ct. 1764. 36 L. Ed.2d 583 (1973), and the fact that *Reed* and *Frontiero* were decided subsequent to *Bugden* vitiates that decision. As is clear from this Court's opinion in *Kahn v. Shevin,* 414 U.S. 973, 94 S. Ct. 1734, 40 L. Ed.2d 189 (1974), such a contention is patently erroneous.

In *Kahn,* this Court held that statutes which place men and women in different classifications for the purpose of reducing the economic disparities between males and females are constitutional. In making this determination the court stated:

> "There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other State exceed those facing the man. Whether from overt discrimination or from the socialization process of a male dominated culture, the job market is inhospitable to the woman seeking any but the lowest paying jobs. There are of course efforts underway to remedy this situation. . . . But firmly entrenched practices are resistant to such pressures, and indeed, data compiled by the Woman's Bureau of the United States Department of Labor shows that in 1972 women working full time had a median income which was only 57.9% of the male median — a figure actually six points lower than had been achieved in 1955. Other data points in the same direction. The disparity is likely to be exacerbated for the widow. While the widower can usually continue in the occupation which preceded his spouse's death in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer." (footnotes omitted).

Kahn v. Shevin, 94 S. Ct. at 1736-37. Based upon the foregoing findings the Court held:

> "There can be no doubt therefore that Florida's differing treatment of widows and widowers 'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation.' *Reed v. Reed* 404 U.S. 71, 76, quoting *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415." (footnote omitted).

Kahn v. Shevin, 94 S. Ct. at 1737. Just as importantly, the Court distinguished *Frontiero v. Richardson* as follows:

> "This is not a case like *Frontiero v. Richardson* 411 U.S. 677, where the Government denied its female employees both substantive and procedural benefits granted males *'solely for administrative convenience.'* " (emphasis added)

Kahn v. Shevin, 94 S. Ct. at 1737.

Petitioner also attempts to escape the impact of *Kahn* and contends that this decision was erroneously construed and misapplied by the Georgia Supreme Court. This contention is also clearly erroneous. In *Kahn* the Court goes to considerable effort to recognize the economic inferiority of females to males, and holds that the different treatment of widows (women) and widowers (men) rests upon an attempt to reduce the economic disparity between the sexes. Just as the legislative classification in the Florida statute in *Kahn* has a "fair and substantial relation to the object of [that] legislation" so does the legislative classification in the Georgia alimony statutes. In Georgia, alimony is defined as "an allowance out of the husband's estate, made for the *support* of the wife when living separate from him." (emphasis supplied). Section 30-201 of the GA. CODE of 1933 (A. 10a). That wives as a class upon separation or divorce require financial support which should be furnished by husbands as a class is clear from the following statistical analysis using the data utilized by the Court in *Kahn.* This data, furnished by the Womans Bureau of the United States Department of Labor, reveals that the average annual earnings of males employed full-time year-round was $10,202.00 for calendar year 1972. During the same period, females employed full-time year-round received average annual earnings of $5,903.00. *Kahn v. Shevin,* 94 S. Ct. at 1736, n.5.

Applying the above statistics to a family of three which is being divided by divorce, such as that in the instant action, reveals that prior to the separation of the spouses, such a family in 1972 would have an average annual income of $16,105.00 or an average of $5,368.33 per person. After divorce, without alimony, and with the father receiving custody of the child, the father would receive an average of $10,202.00 annually, to be divided between him and his child, an average of $5,101.00 annually per person, and the ex-wife would receive $5,903.00. However, if the wife receives custody of the child, which is usually the case with young children, without alimony she will receive an average of $5,903.00 annually to be divided between her and the child, or an average of $2,951.50 per person. A similar statistical analysis utilizing the average figures above for a childless couple also illustrates that the wife in that situation is financially deprived as a result of the divorce. Furthermore, it is obvious that the legislative classification made by the Georgia alimony statutes are not made for the purpose of administrative convenience because such statutes require that the court or jury hear both parties (unless either party waives his or her right to such a hearing) and only after hearing both parties and evidence as to *all* circumstances of the parties may the court or jury make an award of alimony. Sections 30-202, 30-203 and 30-209 of the GA. CODE of 1933, as amended. (A. 10a-12a). Therefore, it cannot be said that the classification made by the Georgia alimony statutes is arbitrary or capricious, or that the classification does not reasonably relate to the object of the leigislation.

Based upon the foregoing, respondent submits that the instant matter currently pending before this Court is

essentially identical to *Kahn v. Shevin* and is distinguishable from *Frontiero v. Richardson.* As in *Kahn,* the legislative classification made by the Georgia alimony statutes is based upon the financial and economic differences between men and women as a class, a reasonable classification, and this classification, men — women, reasonably relates to the object of the legislation, *i.e.,* to provide financial support to an economically inferior class. Because an adversary proceeding must precede an award of alimony, the Georgia General Assembly quite clearly had no intention whatsoever of making the classification for the purpose of achieving judicial administrative convenience. Consequently, *Frontiero v. Richardson* is clearly distinguishable from the instant action.

Petitioner also contends that *Kahn* is a tax case, the decision of which was bottomed upon the principal of non infringement of the power of the states to tax. As a casual reading of the final three sentences and a careful analysis of footnote 10 of the majority opinion in *Kahn* will indicate, this contention of petitioner is also erroneous. These sentences clearly state that the Court applied the traditional equal protection requirements to the state statute in question, not notions of non interference with the power of states to tax, and held the challenged statute to be constitutional. That such is clearly the case is even more apparent from footnote 10. In footnote 10, the Court traces the earlier development of equal protection standards to which statutes challenged on equal protection grounds must comply and then discusses the later introduction of these equal protection requisites into the tax field, thus indicating the appropriate application of these equal protection principals in *Kahn.* Therefore, respondent submits that any notions of tax

policy which constitute a portion of the rationale in *Kahn* are secondary to the controlling requisites of equal protection and economic justification.

CONCLUSION

For the foregoing reasons respondent respectfully submits that this petition for writ of certiorari should be denied.

Respectfully submitted,

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Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of October, 1974 three copies of the Brief For Respondent In Opposition were personally delivered at the office of John C. Tyler, counsel for petitioner, 1747 Equitable Building, Atlanta, Georgia, to counsel or a clerk therein.

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